

**BEFORE THE APPEALS BOARD
FOR THE
KANSAS DIVISION OF WORKERS COMPENSATION**

MICHAEL A. FABER
Claimant

VS.

U.S.D. NO. 259
Respondent
Self-Insured

)
)
)
)
)
)
)

Docket No. 189,442

ORDER

The respondent requests review of the Award and Award Nunc Pro Tunc of Administrative Law Judge John D. Clark entered in this proceeding on June 12 and June 14, 1995, respectively. The Appeals Board heard oral argument on October 19, 1995.

APPEARANCES

Claimant appeared by his attorney, Joseph Seiwert of Wichita Kansas. The respondent appeared by its attorney, Robert G. Martin of Wichita, Kansas. There were no other appearances.

RECORD & STIPULATIONS

The Appeals Board has reviewed and considered the record listed in the Award and depositions of JoLynn Wolfenbarger and Patricia L. Reid, both taken on May 9, 1995. Likewise, the stipulations of the parties are listed in the Award of the Administrative Law Judge.

ISSUES

The Administrative Law Judge awarded claimant permanent partial disability benefits based upon a nine percent (9%) functional impairment rating. The respondent requested this review and contends the Administrative Law Judge erred in three respects: (1) in his determination of the nature and extent of claimant's disability, (2) by considering a medical report generated as a result of a court-ordered independent medical examination

when the physician was not deposed, and (3) by deciding the case without considering depositions that were taken before the expiration of respondent's terminal date, but filed after that date. Those are the issues now before the Appeals Board.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

After reviewing the entire record, the Appeals Board finds as follows:

For the reasons expressed below, the Award of the Administrative Law Judge should be modified. Claimant is entitled permanent partial general disability benefits based upon a five percent (5%) functional impairment rating to the body as a whole.

(1) The Appeals Board finds claimant injured his left lower leg and right foot on April 20, 1994, when a Bobcat loader pinned claimant between the loader and a truck. Claimant was immediately taken by ambulance to a local hospital where he complained of injury to the left lower extremity and the right foot. After an overnight stay, claimant was released from the hospital.

After seeing two other physicians, claimant eventually came under treatment by orthopedic surgeon Thomas Kneidel, M.D., who saw claimant on three occasions commencing May 11, 1994. Dr. Kneidel diagnosed contusion of the left leg and possible contusion of the perineal nerve. On the date he last saw claimant, June 8, 1994, Dr. Kneidel found claimant had fully recovered and had full range of motion in his left leg and no swelling or effusion. Because claimant did not complain to him of problems in his right foot or toes, Dr. Kneidel focused his treatment on the left leg. He concluded claimant had no functional impairment to either lower extremity.

When the parties could not agree upon a functional impairment rating, the Administrative Law Judge ordered an independent medical exam by Ernest R. Schlachter, M.D. Dr. Schlachter examined claimant on January 31, 1995 and diagnosed partial ankylosis and weakness of the right big toe and found that claimant had sustained a crushed injury to the left lower leg. Using the AMA Guidelines, Third Edition Revised, Dr. Schlachter believes claimant has sustained a nine percent (9%) permanent partial impairment of function to the body as a whole as a result of these injuries.

Although he continues to have significant symptomatology in the left lower leg and right foot, claimant continues to work for the respondent. Claimant testified that he is unable to bend the big toe on his right foot, he has difficulty straightening after squatting or kneeling, he cannot run and must occasionally use crutches to walk.

Based upon the evidence presented, the Appeals Board finds claimant has sustained permanent injury to both his left leg and right foot as a result of his work-related accident. However, after considering the significant difference in opinion of Doctors Schlachter and Kneidel regarding the residual effects of the injury, the Appeals Board finds claimant has sustained a five percent (5%) permanent partial impairment of function to the body as a whole for which he is entitled permanent partial disability benefits.

Because the claimant remains in the respondent's employ earning a wage comparable to that he was earning on the date of accident, he has not claimed, nor is he entitled to, a work disability. Since his is a "non-scheduled" injury, claimant is entitled

permanent partial disability benefits under the provisions of K.S.A. 44-510e(a). The statute provides in pertinent part:

“The extent of permanent partial general disability shall be the extent, expressed as a percentage, to which the employee, in the opinion of the physician, has lost the ability to perform the work tasks that the employee performed in any substantial gainful employment during the fifteen-year period preceding the accident, averaged together with the difference between the average weekly wage the worker was earning at the time of the injury and the average weekly wage the worker is earning after the injury. In any event, the extent of permanent partial general disability shall not be less than the percentage of functional impairment. Functional impairment means the extent, expressed as a percentage, of the loss of a portion of the total physiological capabilities of the human body as established by competent medical evidence and based on the third edition, revised, of the American Medical Association Guidelines for the Evaluation of Physical Impairment, if the impairment is contained therein. An employee shall not be entitled to receive permanent partial general disability compensation in excess of the percentage of functional impairment as long as the employee is engaging in any work for wages equal to 90% or more of the average gross weekly wage that the employee was earning at the time of the injury. . . .”

(2) Although neither party took the deposition of Ernest R. Schlachter, M.D., the Administrative Law Judge did not err in considering the medical report that was generated as a result of the court-ordered independent medical exam. In relevant part, K.S.A. 44-510e(a) provides:

“If the employer and the employee are unable to agree upon the employee's functional impairment, such matter shall be referred by the administrative law judge to an independent health care provider who shall be selected by the administrative law judge from a list of health care providers maintained by the director. The health care provider selected by the director pursuant to this section shall issue an opinion regarding the employee's functional impairment which shall be considered by the administrative law judge in making the final determination. . . .”

Respondent contends K.S.A. 44-519 prohibits the Administrative Law Judge from considering Dr. Schlachter's medical report unless he also testifies. The Appeals Board disagrees. The statute upon which respondent relies, K.S.A. 44-519, addresses the admission of medical evidence in a general manner. In contrast, K.S.A. 44-510e(a), specifically addresses the admission of medical reports generated when the parties cannot agree upon functional impairment and the Administrative Law Judge must obtain an independent medical examination. Because a general rule of construction requires specific statutes to take precedence over general statutes, the Appeals Board finds K.S.A. 44-510e(a) is controlling in this situation and requires the Administrative Law Judge to consider Dr. Schlachter's report with or without his supporting testimony. Both parties had the right to depose Dr. Schlachter in the event they believed his report was unclear or needed elucidation.

(3) The Administrative Law Judge issued the Award in this proceeding on June 12, 1995. However, the depositions of two of respondent's witnesses, Ms. Patricia

L. Reid and Ms. JoLynn Wolfenbarger, were not filed with the Administrative Law Judge by the court reporter until June 15, 1995, three days after the Judge signed the Award. The depositions were taken on May 9, 1995, and within respondent's terminal date of May 12, 1995. The delay in filing the depositions appears to be the result of the court reporter forwarding the transcripts to the witnesses for their review and signatures. A third deposition taken of Alan Weldon on May 9, 1995, was filed with the Division on May 17, 1995. Mr. Weldon waived signature.

The respondent contends the Administrative Law Judge erred by entering the award without benefit of the entire record. The Appeals Board agrees. Both K.S.A. 44-523 and Director's Rule 51-3-8 provides that the parties shall be given reasonable opportunity to be heard and to present their evidence. K.S.A. 44-501(a) requires the trier of fact to consider the whole record. K.S.A. 44-523 also requires the Administrative Law Judge to set terminal dates for the submission of evidence.

The question before us is whether deposition testimony should be deemed submitted on the date the testimony is taken or the date the transcript is filed with the Division of Workers Compensation. Because the parties have little control over the date the transcripts are filed with the division, the Appeals Board believes the controlling date should be the date the testimony is taken. As in other legal proceedings, witnesses should, when desired, be given reasonable opportunity to review the transcript of their testimony and the certified shorthand reporter should be given reasonable time to prepare, correct and file the transcript.

Although the Appeals Board agrees with the respondent that the Administrative Law Judge should have postponed the issuance of the award until he had an opportunity to review the two transcripts in question, the Appeals Board believes the failure by the Administrative Law Judge to review the two depositions in this instance constitutes harmless error and this proceeding need not be remanded to the Administrative Law Judge, because the evidence presented in those depositions addressed collateral issues. However, in this instance, the Appeals Board has considered the transcripts of Ms. Reid and Ms. Wolfenbarger in deciding the issues now before us.

AWARD

WHEREFORE, it is the finding, decision, and order of the Appeals Board that the Award and Award Nunc Pro Tunc entered by Administrative Law Judge John D. Clark on June 12, 1995 and June 14, 1995, respectively, should be modified as follows:

WHEREFORE, AN AWARD OF COMPENSATION IS HEREBY MADE IN FAVOR OF the claimant, Michael A. Faber, and against the respondent, USD 259, a self-insured, for an accident sustained on April 20, 1994.

The claimant is entitled to 7 weeks temporary total disability at the rate of \$313.00 per week or \$2,191.00 followed by 408 weeks at \$16.49 per week or \$6,727.92 for a five percent (5%) permanent partial general body disability making a total award of \$8,918.92. As of November 17, 1995, there would be due and owing to the claimant 7 weeks temporary total compensation at \$313.00 per week in the sum of \$2,191.00 plus 75.29 weeks permanent partial compensation at \$16.49 per week in the sum of \$1,241.53 for a total due and owing of \$3,432.53 which is ordered paid in one lump sum less any amount

previously paid. Thereafter, the remaining balance in the amount of \$5,486.39 shall be paid at \$16.49 per week for 332.71 weeks or until further order of the Director.

Medical expenses incurred by claimant as a result of the April 20, 1994 accidental injury shall be awarded to be paid by the respondent. Claimant may be entitled to future medical expense upon proper application to the Director. Claimant is entitled to unauthorized medical expense up to \$500.00 upon proof of payment.

Fees necessary to defray the expenses of the administration of the Workers Compensation Act are hereby assessed against the respondent to be directly paid as follows:

Ireland Court Reporting	
Transcript of Regular Hearing	\$116.87
Kelley, York & Associates, Ltd.	
Deposition of Alan Weldon	\$91.40
Deposition of Thomas Kneidel	\$145.40

Claimant's contract with his attorney is approved to the extent it complies with K.S.A. 44-536.

IT IS SO ORDERED.

Dated this ____ day of November 1995.

BOARD MEMBER

BOARD MEMBER

BOARD MEMBER

c: Joseph Seiwert, Wichita, Kansas
Robert G. Martin, Wichita, Kansas
John D. Clark, Administrative Law Judge
Philip S. Harness, Director